

Illinois Bar Journal
July, 1999
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Maximizing Damages in Soft-Tissue Injury Cases

A trial lawyer's guide to presenting damages evidence in soft-tissue cases.

Auto collisions at relatively low speeds can cause injuries to the soft tissue of the neck, shoulder, chest, or back. These are often invisible injuries and have been belittled for years as "whiplash." The perception is that they are small, frivolous cases.

Unfortunately, jurors believe there are too many frivolous lawsuits and may blame the plaintiff and the lawyer for the lawsuit. Many jurors are suspicious of chiropractors and other professionals who treat such injuries.

The challenges faced by plaintiff's lawyers in such case are thus considerable. This article is designed to help trial lawyers meet the challenge. It reviews the case law on damages, with special emphasis on soft-tissue injuries, and reveals the broad range of admissible evidence.

Pain and Suffering

The plaintiff is permitted to testify to symptoms of pain and suffering, without corroboration by a healthcare provider. *Hyatt v Cox*, 57 Ill App 2d 293, 299 (4th D 1965). Moreover, physicians and lay witnesses can testify to the nature of the plaintiff's injuries by testifying to what the plaintiff said to them in describing his or her bodily condition, as long as the statements were made in immediate connection with the incident. *Chicago City Ry. Co. v Bundy*, 210 Ill 39, 45 (1st D 1904). A healthcare provider can testify to what the patient said in reference to suffering pain. *Chicago B. & Q.R. Co. v Martin*, 112 Ill 16 (1884). Doctors can also express opinions about whether a condition will cause pain. *Placher v Streepy*, 19 Ill App 2d 183, 189 (2d D 1958).

Illinois case law permits family members to testify about their observations of a plaintiff's pain and suffering (it was not error for a family member to testify to the changes in the sleeping habits of her father, *DeYoung v Alpha Construction Co.*, 186 Ill App 3d 758, 769 (1st D 1989)). A relative of the plaintiff can testify that the plaintiff had low self-esteem and needed to see a psychiatrist as a result of personal injuries she suffered. *Id.* Moreover, a witness may testify to observations of natural manifestations of pain, such as facial expressions, moaning, or the plaintiff grasping at an injured body part. *Cooper v Chicago Transit Authority*, 153 Ill App 3d 511, 523 (1st D 1987).

A doctor may express his or her opinion as to whether symptoms of an injury are real, imagined, or feigned. *Hastings v Abernathy Taxi Association*, 16 Ill App 3d 671, 678 (1st D 1973). Therefore, ask a physician during your preparation and at trial whether

your client is a malingerer and if the injury truly produces pain. This is often an issue in a soft tissue injury case.

Future pain and suffering

The plaintiff is entitled to a jury instruction on future pain and suffering when some evidence on the issue is presented. *Harvey v Norfolk & Western Ry. Co.*, 73 Ill App 3d 74, 81 (4th D 1979). Illinois case law provides guidance about what constitutes “some evidence” of future pain and suffering. The instruction clearly is proper when evidence of future pain and suffering is rendered by expert testimony, elicited from the plaintiff, or inferred from the nature of the injury. *Neyzelman v Tretiman*, 273 Ill app 3d 511, 518 (4th D 1995).

Where future pain and suffering can be objectively determined from the nature and severity of the injury, the jury may be instructed on it without testimony on the subject. *Id.* Several cases have recognized that the jury may be instructed on future pain and suffering based solely on the plaintiff’s testimony. Similarly, testimony that at the time of trial the plaintiff complained of a limited range of motion and pain when lifting things over 15 pounds warranted an instruction on future pain and suffering. *Pourchot v Commonwealth Edison Co.*, 224 Ill App 3d 634, 638 (3d D 1992).

In *Onion v Chicago & Illinois Midland Ry. Co.*, 191 Ill App 3d 318, 321 (4th D 1989), the plaintiff’s testimony about future pain and suffering warranted a jury instruction on the issue. The plaintiff testified to his condition post-accident and noted changes in his life. There, the court allowed an instruction on future pain and suffering. Therefore, based on Illinois case law, lay testimony alone can support an instruction on future pain and suffering.

In many soft tissue cases, chiropractors are involved in the patient’s treatment. A chiropractor is competent to “express [opinions] as to the permanence and future pain and suffering in connection with the injury, provided that the matter relates to the chiropractic profession and practice.” *Young v Hummel*, 216 Ill App 3d 303, 310 (1st D 1991). The *Young* court went on to say that this is not limited to chiropractors: “[A]nyone who is shown to have special knowledge and skill in diagnosing and treating human ailments is qualified to testify as an expert if his learning and training show that he is qualified to give an opinion upon the particular issue.”

Where future pain and suffering is not apparent from the injury itself or from the plaintiff’s testimony, expert of opinion testimony that is reasonably certain to occur may be needed to justify the instruction in a soft tissue injury case. *Maddox v Rozek*, 265 Ill App 1007, 1011 (1st D 1994). Expert testimony about the permanency of the pain caused by an injury warrants a jury instruction on future pain and suffering. *Harvey v Norfolk & Western Ry. Co.*, 73 Ill App 3d at 81.

Expert testimony that future pain and suffering is reasonably certain in the future also supports a jury instruction on the issue. *Onion*, 191 Ill app 3d at 320. Thus, the

medical testimony required for the instruction can be elicited from a physician, chiropractor, physical therapist, or other healthcare provider if the proper foundation is laid.

Statements describing medical history, or past or present symptoms, pain, or sensations to treating doctors are admissible as an exception to the hearsay rule if made for medical treatment. *Greinke v Chicago City Ry. Co.*, 234 Ill 564 (1908). The assumption underlying this exception is that the desire for proper diagnosis or treatment outweighs any motive to falsify. More importantly, the statement to a healthcare provider may be made by either a patient or someone with an interest in his or her well-being. *Welter v Bowman Dairy Co.*, 318 Ill App 305 (1st D 1943).

In *Welter*, a treating doctor was allowed to testify about a mother's statements describing her child's symptoms. The court reasoned that the infant could not tell the doctors what had happened and that they had to rely on the mother's information to diagnose the child.

Similarly, it is not error for a physician to testify about his medical conclusions though he relied on information from persons other than the plaintiff. *Becherer v Best*, 74 Ill App 2d 174 (5th D 1966). In *Becherer*, the court held that a physician could testify about the plaintiff's diagnosis even though he relied on a history taken by a resident physician and other historical information provided by the plaintiff's husband and others.

A physician's testimony about the cause of an injury based on information elicited during the history is admissible because it falls within the guarantee of truthfulness. *Koenig v 399 Corp.*, 97 Ill App 2d 345 (1st D 1968). In *Koenig*, for example, the plaintiff's physician testified that plaintiff's injuries were caused when the elevator broke down and fell two floors to the basement. The court (id at 355) wrote that "[s]ince the cause of an injury may be a factor in diagnosis, statements of the cause of any injury or condition have been held admissible because they... fall within the guarantee of truthfulness."

In Illinois, it is well established that proof the plaintiff's health before an injury and a following change is competent to establish that the impaired condition was due to trauma. See, e.g., *Fuery v Rego Company*, 71 Ill App 3d 739 (1st D 1979).

Permanency of injuries

It is well settled that opinion testimony regarding the nature, extent, and permanency of a patient's injuries is permissible as long as it is based on a recent examination of the patient. *Wilson v Chicago Transit Authority*, 126 Ill 2d 171, 176 (1988). However, courts differ as to what constitutes "recent." One court has noted that opinions based on an examination of a patient three years before trial are improper because it was not "recent." *Hendricks v Nyberg, Inc.*, 41 Ill app 3d 25, 28 (1st D 1976). Similarly, a court deemed an examination 28-months before trial not "recent." *Knight v Lord*, 271 Ill App 3d 581, 585 (4th D 1995). The underlying theory is that opinions held

at the time of trial should be considered by the trier of fact. *Henricks*, 41 Ill App 3d at 28.

A treating physician can give opinion testimony regarding permanency based on an examination the day of trial. *Phelps v CTA*, 224 Ill App 3d 229, 232 (1st D 1991). Courts have distinguished and/or limited the *Henricks* rules based on the length of time the physician treated the patient.

For example, a physician's testimony that the plaintiff had reached a permanent state was adequately supported where he had treated the plaintiff for two years, even though he had not examined the plaintiff for four years prior to trial. *Courtney v Allied Filter Engineering, Inc.*, 181 Ill App 3d 222, 231 91st D 1989). An interval of 15 months is within the discretion of the court to permit such testimony when reached after a course of treatment that extended over a period of years. *Marchese v Vincelette*, 261 Ill App 3d 520, 526 (1st D 1994). Questions regarding the validity of the physician's opinion based on the interval go to the weight of their testimony, rather than its admissibility. *Id.*

In *Housh v Bowers*, 271 Ill App 3d 1004 (3d D 1995), the third district explained that the interval between the plaintiff's last examination and the trial goes to the weight to be given to the physician's testimony, not the admissibility. There, plaintiff had not treated with the testifying physician for over a year. However, extensive tests had been conducted and the physician opined that plaintiff's condition would not substantially change over time. Such testimony was proper.

Similarly, in *Ruperd v Ryan*, 291 Ill app 3d 22 (2d D 1997), the plaintiff treated with a physician in an intensive four-week program. The physician authored a report about her condition. Although more than three years had expired from the time of the report to the time of trial, the appellate court affirmed the lower court's allowing the physician to testify regarding the permanency of plaintiff's injuries. The appellate court noted (id at 34):

[A]t the time [the physician] wrote [the report] concerning [plaintiff's] condition, he had recently examined her. Whether [the physician's] opinion regarding the permanency of [plaintiff's] condition should be given less weight because of the events that took place in the tie between his examination and the trial is for the jury to decide.

It appears that the trend in Illinois is to allow the opinion testimony even when an extended interval exists. Such testimony will go to the weight as opposed to the admissibility. When in doubt, have the client examined by the physician prior to trial.

Aggravation of a pre-existing condition

A tortfeasor is liable for the aggravation of any pre-existing soft-tissue injuries. See, e.g., *Balestri v Terminal Freight Cooperative Association*, 76 Ill 2d 451 (1979). Like the

nature, extent, and duration of an injury, a jury should take into account whether a pre-existing condition was aggravated by the incident.

The trial court commits error if it fails to instruct that the jury may not limit the plaintiff's damages because the injury resulted from the defendant's aggravation of a pre-existing condition. *Dabros v Wang*, 243 Ill app 3d 259, 267 (1st D 1993). If the facts of the case warrant, the jury must be instructed on the law governing aggravation of a pre-existing condition or injury.

Physician's opinions – degree of certainty

A physician's opinion that the plaintiff sustained a herniated disk or soft tissue injury is proper even though tests were not performed, provided the opinion is based upon a reasonable degree of medical certainty. *Marchese v Vincelette*, 261 Ill App 3d 52 520 (1st D 1994). If the treating physician's testimony reveals that opinions are based upon specialized knowledge and experience, it does not matter that the physician failed to use the phrase "within a reasonable degree of medical certainty." See, e.g., *Plooy v Paryani*, 275 Ill App 3d 1074 (1st D 1995).

For example, where the treating physician testified about the possibility of a future knee replacement surgery "if surgery was needed," it did not render the opinion speculative because the testimony was based upon a reasonable degree of medical certainty. *Pry v Alton & S.R. Company*, 233 Ill app 3d 197 (5th D 1992).

Remember that many of the opinions go to weight rather than admissibility of evidence. One way to eliminate inadmissible or speculative testimony is to ask the physician a question before eliciting opinion testimony. After going through credentials, ask as follows: "Dr. Smith, does this court and jury have your assurances that all of your opinions will be based upon a reasonable degree of medical and surgical certainty in your area of expertise?" By so doing, you eliminate the possibility of "forgetting" to ask a doctor if his or her opinion is based upon a reasonable degree of medical certainty.

Admission of other injuries

The general rule is that evidence of a person's overall health or physical condition both before and after an injury is admissible to show the extent, nature, and probable effect of the injury and the cause of the subsequent physical condition. This rule is limited by the requirement that the evidence be sufficiently connected to the injury or be material to the issue of damages. *Pry*, 233 Ill App 3d 197.

In *Molitor v Jaimeyfield*, 251 Ill App 3d 725, 728 (2d D 1993), the plaintiff's motion to bar evidence of a prior injury to the same part of her body was allowed because the defendant failed to provide an adequate offer of proof about the extent or duration of the injury, the treatment she received, or whether the injury continued to bother her at the time of this accident.

It is improper for a defense attorney to inquire about similar or dissimilar injuries from prior or subsequent accidents unless the defendant can show that there will be connection between this line of questioning and the plaintiff's injury by competent medical testimony. *Brown v Baker*, 284 Ill app 3d 401, 404 (5th D 1996).

Photographs, videotapes, and illustrations

Photographs are admissible to demonstrate the extent of the plaintiff's injuries. This can include showing photographs of the plaintiff prior to the injury. *Nagelmiller v Seibel*, 47 Ill App 2d 39 (3d D 1964). These photographs can be taken while the plaintiff is in the hospital. *Darling v Charleston Community Memorial Hospital*, 33 Ill 2d 326 (1965). It is also proper to show photographs of the plaintiff's vehicle after an automobile crash if they are relevant to the nature and extent of the plaintiff's injuries. *Cancio v white*, 297 Ill App 3d 422 (1st D 1998).

It is well established in Illinois that films and videotapes, when properly authenticated and relevant, are admissible demonstrative evidence. For instance, a video showing how a plaintiff moved around prior to an injury was held admissible in *Montag v Board of Education*, 112 Ill App 3d 1039 (3d D 1983). Of course, videos of the plaintiff after a claimed injury are admissible as well to show that the plaintiff might be a malingerer. *Carney v Smith*, 240 Ill App 3d 650 (1st D 1992).

In *Bungo v Mt. Sinai Hospital Medical Center*, 201 Ill App 3d 245 (1st D 1990), the first district held that medical illustrations were properly admitted into evidence. There, the defendant attempted to argue that the medical drawings were "subjective, argumentative and misleading." The court flatly rejected the defendant's argument (*id* at 251), noting that "[b]ecause the conditions of swelling, discoloration and the degree of tightness of [plaintiff's] cast depicted in the drawings were highly relevant to [defendant's] liability here, it was proper for the jury to be afforded a visual aid by which to more fully understand the witnesses' testimony."

Conclusion

Handling soft tissue cases are important to the client and the profession. If you decide to handle these cases, do so with an eye towards presenting credible testimony. With proper preparation and courtroom presentation, you can obtain fair compensation for your injured clients.

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